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No. 273

# In the Supreme Court of the United States

OCTOBER TERM, 1968

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RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, and GEORGE KOZBIEL,

*Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UAW-AFL-CIO,

*Respondents.*

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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## BRIEF OF AMICI CURIAE OF WISCONSIN MANUFACTURERS ASSOCIATION, EMPLOYERS ASSOCIATION AND CERTAIN MEMBERS OF CONFERENCE OF STATE MANUFACTURERS ASSOCIATIONS, INC., IN SUPPORT OF PETITIONERS

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WALTER S. DAVIS
324 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
*Counsel*

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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With consent of the parties, the Wisconsin Manufacturers Association, the Employers Association, and Certain Members of Conference of State Manufacturers Associa-

tions, Inc.[1] respectfully submit this brief as *amici curiae* in support of the Petitioners' position in this case.

## Interest of the Amici Curiae

The Wisconsin Manufacturers Association (WMA) is a voluntary association of manufacturing enterprises with operations in Wisconsin. It was founded in 1911 and is now constituted of over 1300 member-enterprises employing over 450,000 people. This constitutes approximately

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[1] Because of time limits and the inability to hold a special meeting of the association, the following members of the Conference of State Manufacturers Associations, Inc. only were able to reply to a poll indicating their affirmative desire to participate herein as *amici curiae:*

Arizona Association of Manufacturers
Georgia Business & Industry Association
Illinois Manufacturers' Association
Indiana Manufacturers' Association
Iowa Manufacturers' Association Executive Committee
Associated Industries of Kansas
Associated Industries of Kentucky
Associated Industries of Maine
Michigan Manufacturers' Association
Mississippi Manufacturers' Association
New Hampshire Manufacturers' Association
New Jersey Manufacturers' Association
Associated Industries of New York State, Inc.
Ohio Manufacturers' Association
Associated Industries of Oklahoma
Pennsylvania Manufacturers' Association
Tennessee Manufacturers' Association
Texas Manufacturers' Association
Utah Manufacturers' Association
Virginia Manufacturers' Association
Association of Washington Industries
West Virginia Manufacturers' Association

85% of all those employed in manufacturing in Wisconsin. The average number of employees per member of the association is under 100.

Since its founding, WMA has represented Wisconsin industries in obtaining equitable rail, air, mail and shipping rates, fair consideration on unemployment and workmen's compensation, taxes, wages and hours and labor-management legislation.

The Employers Association is a voluntary association of Wisconsin business firms operating in eight (8) southeastern Wisconsin counties. It includes companies engaged in manufacturing, processing, distribution, banking, insurance, and graphic arts, as well as service organizations and institutions such as hospitals and nursing homes. It was organized in 1935, and stems from an earlier group founded in 1901. About 480 businesses comprise its present membership.

The Employers Association is a working business organization staffed to provide services to members in the broad field of employee relations. It originates, or secures data, and offers counseling and training for self-improvement in management skills. Though not directly affiliated with other organizations, the Employers Association works closely with various national, state and local employment groups.

The Conference of State Manufacturers Associations, Inc. (COSMA), is a voluntary association of the primary associations for the manufacturers of each state where one exists. Present membership includes thirty-nine such member-organizations. The WMA is one such member.

COSMA was organized to improve and advance American industry through close cooperation and mutual assist-

ance between state manufacturers' associations, including the exchange of technical and general information on problems of primary importance to state groups.

To further these goals, COSMA performs a number of functions. Among these are the following: serving as a forum for the discussions of important problems of primary concern to state manufacturers' groups, including Federal and state programs and regulations affecting industry, and serving as a clearing house for information, technical assistance, and action on matters requiring special attention by state manufacturers' associations.

The interest of the WMA, the Employers Association, and those members of COSMA joining this brief stems not only from the natural interest provoked by reason of a question concerning the interpretation of a collective bargaining agreement, but from their long time interest in labor-management affairs, and especially in the protection of the rights of individual employees under Section VII of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 29 USC, §151, et seq.; hereafter "Act"), and the preservation of the principle of collective bargaining. The fines involved here have been the subject of many discussions, quite often with the mention of Wisconsin industry, and always with the mention of American industry. The interest of *amici* here is to assist in righting an error in the administration of the Act which has become manifest in these long proceedings. The effect of such error, if allowed to stand, would be so far-reaching that the attendant evil will undoubtedly cause a regression in the effectiveness of the collective bargaining process and the creation of a series of acrimonious labor-management disputes for years to come.

After an extended hearing and review, the National Labor Relations Board held, member Leedom dissenting, that the fines here imposed by the Union on employees who had violated the Union's production ceiling were not violative of §8(b)(1)(A) of the Act. That decision is reported at 145 NLRB 1097.

Upon a petition for review, the United States Court of Appeals for the Seventh Circuit, Judge Knoch dissenting, denied review of the Board's findings, thereby leaving the Board's decision of dismissal standing. That decision is reported at 393 F. (2d) 49.

On October 14, 1968, this Court granted a Writ of Certiorari in this matter. ..... U.S. ....., 89 S.Ct. 120.

The two issues in this matter are:

1. "Whether a Union restrains or coerces an employee in the exercise of a right guaranteed by Section 7 of the National Labor Relations Act, in violation of §8(b)(1)(A), when the Union fines the employee and attempts to collect such fine by Court action, because the employee performed work and earned wages in excess of certain production quotas established and enforced by the Union."
2. "Whether the Petition for a Writ of Certiorari was timely filed."

This brief *amici curiae* is addressed only to the first question presented and emphasizes from the objective views of industry in general, rather than the partisan views of the parties litigant, what are considered the errors in the decision below.

## ARGUMENT

### 1. The Act Elevates Collective Bargaining and Agreements Reached Thereby to a Unique and Favored Status.

In the case at bar, the simplest facts are that an employee has performed his work consistent with the collective bargaining agreement negotiated between the management and the union pursuant to the Act. This work performance, however, has violated a by-law rule of the union imposed upon its members and accordingly a fine and discipline are being initiated. Under the terms of the union rule, a fine could be imposed for daily violation and thereby, if enforced, economically cost the employee more to work than to remain idle. It is asserted that under these circumstances the union is violating §8(b)(1)(A).

From its inception it has been recognized that Congress has created a unique and favored institution in collective bargaining. It is the institution Congress selected to protect the rights of individual employees and enhance the prospects of industrial peace. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1. Through this process labor and management were given the vehicle to establish "their own charter for the ordering of industrial relations." Compulsion by government was limited to the forcing and protection of the institution of collective bargaining, for agreement or concession is not required. *NLRB* v. *American Nat. Ins. Co.*, 343 U.S. 395, 402 (1952).

So favored is the institution of collective bargaining that unilateral action by one of the parties while the duty to bargain exists is unlawful. *NLRB* v. *Katz*, 369 U.S. 736 (1962); *Fibreboard* v. *NLRB*, 397 U.S. 203 (1964); no

private agreement touching on the subject of wages, hours and working conditions between employer and employee obviates, negates or waives the duty to bargain, *J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944); nor can the enforcement of state law proscribe in any manner the rights and obligations of the parties. *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283 (1959).

Once the collective bargaining agreement has been reached, various consequences stem therefrom. It has been said that the agreement "trades out the terms of employment" and that the employee by virtue of the Act becomes "somewhat as a third party beneficiary to all the benefits" of it. *J. I. Case Co., supra*, pp. 335-336. Accordingly, an employee-beneficiary can bring suit for a claimed breach of the collective bargaining agreement in either federal or state court. See, *Smith* v. *Evening News Ass'n.*, 371 U.S. 195, 199-200 (1962).

Here, petitioners have performed work and have received benefits in accordance with the terms of the collective bargaining agreement. They do not seek to enforce the labor agreement, but the claim is made that by asserting their rights as negotiated for their benefit by the union, they have violated a union-imposed production ceiling and are therefore subject to fine and discipline. Is this by-law restriction to be given a wider exemption from negation than unilateral action, private agreements or impinging state laws? It is submitted that it should not.

### 2. Union Discipline in Contravention of Rights Negotiated in a Collective Bargaining Agreement Should Not be Condoned.

The efficacy of union discipline *vis-a-vis* a collective bargaining agreement was before this Court in an analogous situation earlier. In *NLRB* v. *Teamsters*, 347 U.S.

17 (1954), an employee was five days late in paying his union dues and the union, which it had a right under the literal terms of the collective bargaining agreement, dropped the employee from 18th on the seniority list to 54th. The employee filed a charge under the Act claiming the union had violated §8(b)(1)(A). In affirming the Board's position that the Act had been violated, this Court observed that with respect to union membership the Act attempted to insulate an employee's job rights from his organizational rights and that the Act guaranteed employees the right to "be good, bad or indifferent members (of unions) or abstain from joining any union without imperiling their livelihood except as restricted by a legal union security agreement." Page 40.

Here, petitioners are being coerced in the same manner as the employee who fails to pay his dues—*i.e.*, the collective bargaining agreement does not provide for such discipline; his indifference or bad membership in the union is being advanced as the reason to imperil his livelihood; and he is being deprived of his right to abstain from union activity without affecting his job status.

Viewed from another perspective, the union's enforcement of its production ceiling by-law is nothing more than a unilateral attempt to regulate wages in contravention of its mandatory duty to bargain them. *Katz, supra,* clearly reestablishes the long standing and broad rule prohibiting such action. Here, benefits have been negotiated between the parties and incorporated into an agreement. The employees seek to obtain the benefits. The union effectively places a substantial and meaningful deterrent to obtaining them by way of fine. Had the employer sought to impose production ceilings after negotiating the contract without them, he would have clearly violated the Act by

his unilateral action even though it could be asserted he had acted in his own legitimate self-interest to keep his payrolls within limits instead of cutting back hours or laying off. What the union does not do is allow this genuinely economic question to be raised and resolved by collective bargaining. It does not impose its production ceiling requirement upon the employer by insisting that it be placed in the bargained agreement.

That some segments of the union movement have held a traditional position in opposition to incentive pay programs cannot be denied. That this position may be said to be consistent with "legitimate union objectives" also may be admitted. But, it is submitted, the Board and the lower court have both missed the precise point on this argument. If it is said that regulation of production is a legitimate aim of the union in that it protects jobs for more members, then it is identical in quality with the other legitimate aims of unions such as recognition, union security, seniority, grievance procedures, etc. Consequently, the issue is not whether the aim is legitimate, but whether, assuming its legitimacy, the union can handle it unilaterally —*outside* the collective bargaining agreement. We submit that it cannot. The effective regulation of production and thereby wages to be received is a matter upon which there must be bargaining, and cannot be dealt with unilaterally. Being so closely and intimately integrated with the wage structure, the question as to whether production ceilings shall be part of the "trade agreement" is clearly a mandatory subject of bargaining and it is doubtful whether either party can claim that the other has waived bargaining on the subject in the absence of a "clear and unmistakable" showing of the waiver. See, *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421 (1967).

### 3. Internal Affairs of Union Doctrine Not Applicable.

In *NLRB* v. *Industrial Union,* 391 U.S. 498 (1968), this Court observed that the proviso to §8(b)(1)(A) of the Act assured "a union freedom of self-regulation where its legitimate internal affairs are concerned." *NLRB* v. *Wooster Division of Borg Warner Corp.,* 356 U.S. 342 (1958), teaches that a bargaining proposal by an employer which "deals only with relations between the employees and their unions" is only permissably bargainable—*i.e.,* cannot be insisted upon to the point of impasse.

In the case at bar, the lower court held that the employer here could go to impasse on whether the union could maintain its production quota rules, but at the same time held no violation of §8(b)(1)(A) had been made out because that section did not "encompass internal affairs of the unions." 393 F.(2d) at pp. 52 and 54.

It is submitted that for the reasons hereinabove set forth, the promulgation of production ceilings by one of the parties unilaterally and outside of the collective bargaining agreement is not a matter unrelated to wages, hours and conditions of employment. On the contrary, in essence being an integral factor in the subjects of mandatory bargaining, production ceilings cannot be equated to the "internal affairs" of a union. A production ceiling rule determines *perforce* hours worked, wages paid, and may involve the very essence of security on the job. This is an historical position of some labor unions. Accordingly, the proviso to §8(b)(1)(A) of the Act must be read realistically. When Congress said that a labor organization could prescribe its own rules with respect to the acquisition or retention of membership, these words have to imply the additional proviso:—so long as "no other considerations of public policy come into play." *NLRB* v. *Industrial*

*Union, supra,* at ..... U.S. ....., 88 S.Ct. 1717, 1721. Stated otherwise, a union can manage its own internal affairs relating to membership so long as it is not, under the guise of doing so, in fact avoiding its obligation to bargain; in fact, regulating wages, hours and conditions of employment in contravention of its collective bargaining agreement; in fact, tearing asunder the insulation between an employee's job rights and his organizational rights.

*NLRB* v. *Allis-Chalmers Mfg. Co.,* 338 U.S. 175 (1967), held that union solidarity during a strike was a legitimate concern involving internal affairs. It was there said that the legislative history of the Act did not refer to "traditional internal discipline in general." But where Congress has protected the right to strike explicitly and guaranteed employees against discrimination for engaging in such concerted activity, it can hardly be said that other considerations of public policy are involved. Here, on the other hand, there are other considerations of public policy. Employees will, if the decision of the lower court stands, be denied the benefits they are entitled to under the negotiated agreement. Unions will be given *carte blanche* to regulate wages, hours and conditions of employment outside of their negotiated agreements. Employers will be required to investigate the organic documents of the union in order to determine what disciplines on members must be negotiated to the employers' satisfaction, apparently, to the point of impasse until the offending by-law is amended or revoked. In time, what was referred to as an internal affair of the union will become an employer affair. Categorization of the facts herein as an internal affair of the union may be convenient for rationalization, but it does not accurately portray their true significance.

## CONCLUSION

Congress, the Board and the courts have promoted and protected collective bargaining as the one best method for promoting industrial peace short of total governmental compulsion. This method does not require agreement, but it does require good faith bargaining and a signed agreement if resolution of issues is reached.

Negotiated agreements are enforceable by the beneficiaries of those agreements, including the employees covered thereby.

Where an employee seeks what he has earned under an agreement but is denied it effectively by unilateral action by one of the parties, a serious encroachment has been made in the institution of collective bargaining. When the denial springs from the union on the ground that it is merely regulating its internal affairs, it should not be countenanced. Such regulation is not purely an internal affair, but, on the contrary, is directly related to the mandatory subjects of collective bargaining.

Other considerations of public policy are involved here—*viz.*, the sanctity of bargaining and the effectiveness of contracts resulting therefrom. Industry has and will continue to fulfill its responssibilities to bargain and reach agreements on the subjects of wages, hours and working conditions. Having done so, however, it should not then be required to bargain out a union's by-laws so that it may be sure that its employees will not all be removed from the economic arena by fines if they seek to gather to themselves what their union and their employer have negotiated for them.

For the foregoing reasons it is respectfully submitted that the decision below should be reversed with appropriate instructions.

Respectfully submitted,

WALTER S. DAVIS
*Counsel for Wisconsin Manufacturers Association, Employers Association, and Certain Members of Conference of State Manufacturers Associations, Inc.*

324 East Wisconsin Avenue
Milwaukee, Wisconsin 53202